

**Editor's note: Reconsideration denied by Order dated March 25, 1993**

NATIONAL ORGANIZATION FOR RIVER SPORTS

IBLA 90-205

Decided August 26, 1992

Appeal from a decision of the Medford, Oregon, Acting District Manager, Bureau of Land Management, denying a request to transfer commercial use privileges to noncommercial use on the wild section of the Rogue River. OR 8351.2.

Affirmed.

1. Special Use Permits--Wild and Scenic Rivers Act

Where BLM's decision not to transfer commercial use privileges to noncommercial use on the wild section of the Rogue River is supported by the record, sound management policies, and applicable precedent, it will not be disturbed on appeal.

APPEARANCES: Eric Leaper, National Organization for River Sports, pro se; Donald P. Lawton, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The National Organization For River Sports (NORS) has appealed a November 20, 1989, letter decision by the Medford, Oregon, Acting District Manager, Bureau of Land Management (BLM), denying a request to transfer the former Farley, Inc., commercial use allocation to noncommercial use allocation on the Rogue River wild section. 1/

Under the Act of October 2, 1968, 16 U.S.C. § 1271 (1988), the Rogue River is administered jointly by BLM and the Forest Service. On July 7, 1972, a combined plan of the Forest Service and BLM for the Rogue River was published in the Federal Register (37 FR 13408 (July 7, 1972)). This plan provided that regulation of boating in the wild section of the river would be initiated when necessary to achieve the objectives of the Act.

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1/ The Farley, Inc., use allocations were forfeited to BLM as a result of sanctions imposed for the violation of policy guidelines prohibiting transfer of a special recreation permit in conjunction with the sale of a business without BLM's approval. See David Farley, Inc., 90 IBLA 112 (1985), aff'd, Ken Warren Outdoors Inc. v. U.S. Department of the Interior, No. 87-3681 (9th Cir. July 5, 1988).

In order to fairly allocate limited access to the river as between commercial and noncommercial users, BLM, after considerable deliberation and consultation with interested groups, implemented a 50/50 method of allocation. See Wilderness Public Rights Fund, 63 IBLA 91, 95 (1982).

On August 15, 1988, NORS first filed with BLM a request to transfer the former Farley, Inc., commercial use to the noncommercial allocation for Rogue River trips. NORS stated that its request was based on Wilderness Public Rights Fund, supra, in which the Board suggested five options for distributing use privileges forfeited by a commercial permittee. We stated:

BLM may then distribute the use in a manner consistent with sound management policies. For example, BLM could (1) cancel the use; (2) reserve the use; (3) allocate the use to the common pool; (4) allocate the use to noncommercial users; or (5) reissue the permit to a new commercial operator by a procedure such as open government bidding or other administrative determinations of which organization could provide the best service to the public.

Id. at 98-99. NORS stated in its letter that it expected BLM to follow one of these alternatives and to issue a statement why the chosen alternative was consistent with sound management policies. NORS then asserted that sound management policies "would seem to dictate that the use should be allocated to noncommercial trips."

By letter of January 11, 1989, the District Manager responded that "for the last few years \* \* \* the open dates associated with the original Farley, Inc. Rogue River wild section use allocation" had been utilized "within the commercial scheduling process \* \* \* and are integral with the concept of 50/50 use allocation." The District Manager explained that all "open" dates not secured by commercial users during the period between the formation of the draft commercial schedule and the final schedule "have been included in the dates available for the noncommercial lottery," and that no change in the number of commercial passengers was allowed after formation of the final calendar. He further stated that no major changes in the existing allocation system would be considered until completion of a comprehensive study of use allocation, user trends, and management methods.

In subsequent correspondence, NORS questioned the need for a comprehensive study and asserted that there was a large unaccommodated noncommercial demand. NORS again requested BLM to transfer the Farley, Inc., allocation to noncommercial users.

In his November 20, 1989, letter decision, the Acting District Manager declined to approve the request, repeating the reasons enumerated in the District Manager's January 11, 1989, letter.

In its statement of reasons, NORS asserts that the chances of obtaining a permit in BLM's mid-winter lottery for noncommercial trips are less than one in ten. NORS alleges that the public demand for noncommercial trips is

substantially larger than the public demand for commercial trips and urges that BLM should abandon its 50/50 allocation concept. NORS also asks BLM to explain why the requested transfer would not be in the interest of sound management policy.

BLM notes that the 50/50 allocation system was previously upheld in Wilderness Public Rights Fund, *supra*. BLM also points out that under its mid-winter lottery system, permits for noncommercial use on the wild section of the Rogue River are required only during the regulated season, and that on all other designated segments of the Rogue River throughout the year, noncommercial use does not require a permit. BLM notes that because of multiple applications, it is questionable whether the number of applications received is an accurate representation of demand. Moreover, BLM points out, noncommercial permits are available through the "open pool" and the "commercial pool." The open pool consists of both commercial and noncommercial starts but is available only to noncommercial users. The common pool is made up of the remaining starts which have been (1) allocated but not confirmed within 10 days of the launch date; (2) allocated and confirmed but cancelled within 9 days of the launch date; or (3) allocated and confirmed but not registered by 2 p.m. on the assigned launch date. These spaces are available to both commercial and noncommercial users on a first-come first-served basis. According to BLM's 1989 Rogue River Actual Use Report (Answer, Exh. 2), 39 percent of the noncommercial use on the wild segment of the Rogue River was obtained through the open pool and the common pool rather than the lottery system. The report also indicates that actual noncommercial use has been greater than commercial use for every year since 1979. BLM states that the number of noncommercial users continues to be significantly below the total use allocation available to noncommercial users. BLM asserts that while a noncommercial user may not be able to run the river on the date he may prefer, his chances of obtaining a permit are excellent if he can be flexible applying for starting dates through the pool systems. BLM contends that under applicable Board and court decisions the 50/50 split of use between commercial and noncommercial users is rationally based and should be upheld.

NORS has submitted a response to BLM's answer. It argues that since the public has equal rights to use the river commercially and noncommercially, use allocations cannot be considered fairly made unless noncommercial and commercial space may be reserved at equal convenience (Response at 7). NORS contends that shifting the Farley, Inc., spaces to noncommercial use would be a "small step towards 'fairly made' allocations." NORS further contends that allocations must be adjusted to reflect current public demand (1990 and 1991), and that the ratio of actual use should reflect the ratio of demand. NORS argues that a 50/50 split can be fair only if the public demand were 50-percent commercial and 50-percent noncommercial (Response at 10). NORS alleges that in the present appeal none of the commercial demand was deprived of access although 62 percent of the noncommercial demand was deprived of access. NORS alleges that BLM's intended allocations for 1990 and 1991 are not fair because they are not in the same ratio as the ratio of public demand. NORS asserts that it has shown a large unsatisfied noncommercial demand, "as shown by the 11% chance noncommercial

lottery, the numerous unsuccessful call-ins after the lottery, and the large number of after-season noncommercial trips" (Response at 12). NORS emphasizes as its "key argument" that BLM must transfer the former Farley, Inc., spaces to noncommercial use in order to bring the allocation ratio closer to the public demand ratio. NORS suggests that its arguments are solidly supported by Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979), cert. denied, Wilderness Public Rights Fund v. Andrus, 446 U.S. 982 (1980). We disagree.

[1] We begin our discussion with Wilderness Public Rights Fund v. Kleppe, supra, which involved the apportionment of boating permits between commercial and noncommercial users on the Colorado River. With respect to convenience, one of the points raised by NORS, the court stated:

Appellants also complain that noncommercial applicants receive unfair and unequal treatment at the hands of the [Forest] Service. They must apply to the Service for permits and thus must plan their trips well in advance. Deadlines must be met. The names of all in the proposed party (with signatures) must be set forth. Those who make the trip under guide may deal directly with the concessioners and make arrangements at the last minute. This comports with the NPS' right to regulate river trips in the interest of safety. 36 C.F.R. § 7.4(h)(3). We find nothing unreasonable in thus assuring, as matter of safety, that those who make the trip on their own without concessioners' supervision have undertaken the necessary preparation and possess the necessary skill to participate in the activities involved.

Id. at 1254. As the court also noted, the appellants in that case ignored the fact that commercial operators are concessioners, providing a service for the public visiting the area, and that the basic "face-off" was not between commercial operators and noncommercial users, "but between those who can make a run without professional assistance and those who cannot." Id. The court concluded that allocation between commercial and noncommercial users was not an arbitrary method of recognizing and accommodating the interests of each so long as the allocation is fairly made. Id. As the court clearly indicated, a fairly made allocation is one in which a number of pertinent factors are considered, and is not defined by equality of convenience or demand for access alone.

NORS' objections to the 50/50 allocation were previously addressed by this Board in Wilderness Public Rights Fund, 63 IBLA at 95. We stated:

The State Scenic Waterway's director and BLM eventually arrived at the 50/50 allocation as a result of public reaction to the proposal of the Rogue River policy group. This decision was supported by an independent study of the Forest Service. BLM's allocation system is not arbitrary or capricious, but rather is based on facts assembled from study of use of the river and is a sound effort to protect the environment of the river. Outdoor Adventures, S.W., 50 IBLA 90, 93 (1980).

In United States v. John Garren, CR No. 85-6058-M (D. Ore. Sept. 10, 1986), the court reviewed the allocation system in light of the principle that a regulatory scheme will be upheld unless there is no rational relationship between the regulation and the purposes it seeks to achieve. The court then reviewed allocated and actual use for 1985, stating at pages 5-6 of its Opinion and Order:

The 1985 records indicate that for the summer season 6,804 non-commercial spaces were allocated and 5,163 or 82% of those spaces were used. 6,170 commercial spaces were approved. Of those, 4,328 spaces, or 70% were used. Non-commercial use has exceeded commercial use every year since 1980. During those years non-commercial use has not been less than 52% nor more than 59% of the total use.

Even though the regulations require an approximately even split between commercial and non-commercial users, these statistics indicate that non-commercial users were actually granted more spaces and used slightly more spaces than commercial outfitters. To the extent that non-commercial users have exclusive access to open pool permits all season [and] to common pool permits during the two summer holiday weekends, the regulations now favor the non-commercial rafters.

Defendants' argument that the regulations should favor them even more to accurately reflect public demand is not supported by the use statistics. Neither group has used all of its allocated spaces over the course of the summer season.

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The regulations attempt to split access to the Rogue approximately equally between those individuals who can raft the river without professional assistance and those who cannot. This distinction is both logical and reasonable. The statistics showing public demand for use of the river do not indicate that the allocation system is depriving an unequal percentage of non-commercial users from access to the river. Over the course of the regulated season there are more than adequate spaces among both groups to meet the user public's demand.

The figures discussed by the court in Garren appear in BLM's Exhibit 2, which is updated to 1989. <sup>2/</sup> The conclusions drawn by the court in Garren remain valid through 1989. In that year 5,772 noncommercial and 5,494 commercial spaces were used. In 1989, as in every year since 1979, noncommercial use exceeded commercial use. NORS has alleged but not shown that the

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<sup>2/</sup> In The 1989 Rogue River Actual Use Report (BLM's Exh. 2), the figure for 1985 actual noncommercial use is 5,613, rather than 5,163, as noted in the court's decision.

allocation system is depriving an inordinate percentage of noncommercial users from access to the river. The only evidence of use data and statistics is BLM's Exhibit 2. NORS speaks of "current public demand" and a "large unsatisfied noncommercial demand" to which, it urges, BLM's allocation system must be responsive. However, NORS fails to present quantifying data or statistical evidence which would raise doubts as to the propriety of the allocation system. NORS' key argument, that BLM must transfer the Farley, Inc. spaces to noncommercial use, is not supported by any of the applicable case law, and ignores the scope of the discretion which the agencies have in apportioning use, consistent with sound management policy. As the court observed in Wilderness Public Rights Fund v. Kleppe, *supra* at 1254, where several administrative solutions exist for a problem, the courts will uphold any solution with a rational basis, but the Secretary's balancing of competing uses must not be an arbitrary one. Thus, the Board suggested five management options in Wilderness Public Rights Fund, 63 IBLA at 98-99. NORS requests in this appeal that BLM be compelled to follow a specific option, and contends that its refusal to do so is arbitrary and capricious. Where a decision is made in the exercise of discretion, it must be supported by a rational and defensible basis or it will be found arbitrary and capricious. Four Corners Expeditions, 104 IBLA 122, 125-26 (1988). The reasons BLM declined to transfer the Farley, Inc., spaces to noncommercial use are explained in its pre-appeal correspondence with NORS. NORS has failed to adduce evidence or cite precedent in light of which BLM's refusal to take the action requested by NORS could be regarded as arbitrary or capricious.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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John H. Kelly  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

